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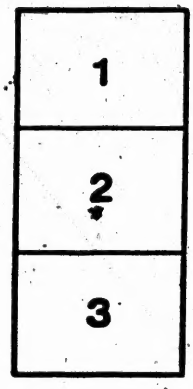

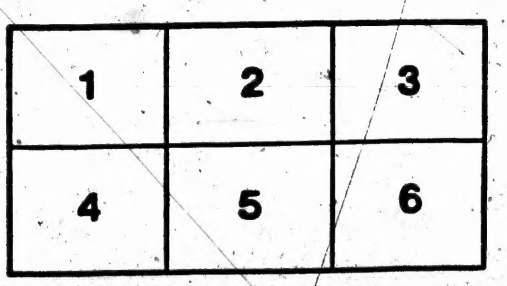

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In the Queen's Bench

APPEAL SIDE.

BENEDICT TYLER.

Appellant.

vs.

HIRAM VAUGHAN,

Respondent.

APPELLANT'S CASE.

PROVINCE OF CANADA, }
LOWER CANADA TO WIT.

Court of Queen's Bench.

APPEAL SIDE.

BENEDICT TYLER,

Defendant in the Court below,

Appellant.

against

HIRAM VAUGHAN,

Plaintiff in the Court below,

Respondent.

APPELLANT'S CASE.

This was an action ... [illegible] in which the Respondent being Plaintiff in the Court below, alleged that the Appellant, being Defendant in the Court below, on the 11th August, 1856, entered upon seventy five acres westerly end of Lot No. 8, in the 7th Range of Hatley, then and theretofore for more than a year in possession of Respondent, and cut down and pulled up trees, underwood, grass and crops growing thereon, and other trouble and wrongs did commit, to the damage of said Respondent of seventy pounds. It is not alleged that said acts were done against the will of Respondent. The action was met firstly by a special denial of the allegations of the declaration, and particularly by a denial that Respondent had been for a year before the institution of the action, in peaceable possession of the land where the alleged trespass was committed; and secondly, by peremptory exception that Appellant had acquired a right of servitude upon said land for a road or passage across it from Francis and James Sweeny, the previous proprietors of the 75 acres now owned by Respondent, to enable Appellant to reach a parcel of land owned by him in the rear of said 75 acres. Francis and James Sweeny sold the said 75 acres to one Chester Woodward, who sold the same to Respondent. The title by which Appellant claimed said servitude is of record and the following is a copy.

DEFENDANT'S EXHIBIT No. 1.

An Agreement between Benedict Tyler, and James Sweeny and Francis Sweeny.

This is to certify that we, the proprietors of said lot or parcel of land in the Township of Hatley, County of Stanstead, do agree to divide the East end of Lot No. Four in the seventh Range, being owned by the above mentioned Benedict Tyler, and James Sweeny and Francis Sweeny, the said Benedict Tyler does hereby agree to take the West end of said lot or parcel of land already surveyed for his part. The said Benedict Tyler is allowed the privilege of a convenient road through the said James Sweeny and Francis Sweeny's land, starting from the edge of the lot No. Three at the edge of the swamp to the cross way now travelled, passing through the above mentioned Lot, to get into said Tyler's ~~land~~ Land.

Hatley January [illegible], 18[illegible].

J. SWEENY,
FRANCIS SWEENY.

Witnesses, } LUTHER WILCOX,
HENRY SWEENY.

The Appellant also alleges that he had had the peaceable possession and enjoyment of said right of way since the [illegible] January, 18[illegible], and further that said road or right of way had been used by the public for more than [illegible] years prior to the institution of the action, and that Appellant was only exercising such right of [illegible] and crossing said land for the ordinary purposes of transporting the produce of the land which lay in rear of said seventy-five acres to his front place on which is his dwelling house, at the time when he [illegible]

[illegible]

tered upon the question of title and condemned Appellant, but said Judgment was abandoned inasmuch as the Justices were convinced of their error, and refused to enforce it. The second trial before John McConnel, J. P., in July 1857, resulted in the dismissal of Respondent's complaint of trespass, and the reasons given for the decision appear in the papers of record to be this : "that the road in question had been processverbaled and had been travelled more or less for fifteen years." The defence to both these complaints before the Magistrates, by Appellant, was, that "*id feci jure feci.*" There could have been no doubt with Respondent when he instituted the action now in appeal, as to Appellant's pretensions. He claimed in the most emphatic manner a right of passage across Respondent's land. The fact of possession is sufficient to maintain an ordinary action *en complainte*, because the law refuses to enter upon the discussion of titles with a trespasser, but the possession must be unequivocal and undisputed, and it must be the *possession annale*. It is proper to observe that there is no proof of a *trouble* in the general sense contemplated by the action. It clearly appears by the evidence that Appellant never claimed or asserted possession of any part of Respondent's land. He claimed a right of servitude and the possession and enjoyment of a servitude under title for some 17 years. The action in such case is clearly pointed out by the law. It is of little consequence what name is given to the action. The object of it would be to have the land declared clear of servitude, and must be founded upon titles. (Vide Pothier, Coutume d'Orleans, Introduction au Titre XIII., No. 11.

Serpillon, Commentaire sur l'Ordonnance du 1667. Title 18, Art. 5, Note :

"Il y a cependant une exception à la regle qui defend de cumuler le possessoire avec le petitoire cet article n' a entendu parler que de possessoire du fait. Le possessoire de droit est de sa nature, necessairement joint au petitoire, *quia mixtam habet proprietatis causam*.....C'est cet exercice qui en fait la possession, de même que d'une servitude, qui est un droit d'une autre nature, et qui est possédé par l'usage que l'on en fait, quoique l'on ne possédo pas le fonds sur lequel elle est due ainsi celui qui a un droit de passage sur le fonds de son voisin, possède cette servitude en passant sur un heritage qu'il ne possède pas."

Farther on we find this : "Il y a une grande difference entre une demande en complainte au sujet d'un heritage et celle qui est intentée pour un droit réel. Dans le premier cas, c'est un possessoire de fait ; dans le second cas, c'est un possessoire de droit, qui se decide par les titres."

Pothier Procedure Civile, Mot, Possession, pp. 104—5 : "Pareillement si je suis en possession de quelque droit de servitude sur un heritage voisin et qu'on m'empeche d'en jouir il y a lieu à la complainte ; mais pour qu'il paroisse que je suis en possession de ce droit de servitude, par example, d'un droit de passage, il ne suffit pas que j'aie passé, car on presume que c'est par tolerance que jai passé ; or une possession precaire or de tolerance ne donne pas lieu à la complainte, mais il faut qu' il paroisse que j'ai passé *comme usant du droit de passer*." Vide also Merlin, Questions de droit, Mot, "Servitude," Section V., Question 3 1.

No feature of our civil law is more marked than its directness. It exacts good faith in all actions, and does not admit of parties obtaining a decision of conflicting interests in any other manner than by their being brought distinctly in issue. It is not consonant with its provisions, or with reason, that by an action alleging a *trouble* of the nature of a usurpation of possession, judgment can be obtained to extinguish a claim of servitude. Pothier in his Procedure Civile, page 107, says that if the defendant in an action *en complainte* does not deny the plaintiff's possession, but simply denies the trouble, the action degenerates into a simple action of damages, and is a personal action *ex delicto*, evidently indicating that the *combat de possession* is the distinctive characteristic of this action. This action is reciprocal, each party is both plaintiff and defendant. This clearly proves that the thing contended for by each must be of the same nature. The inference Appellant draws from these principles is, that to defeat the Respondent's action, it was only necessary for him to show that no *trouble* of the nature complained of had been committed ; that there never had been any pretension on his part to usurp possession of any part of Respondent's land. It was only necessary for him to suggest his title, or show color of title as a means of showing the quality of his acts upon Respondent's land. This course was rendered Appellant's proper mode of defence, inasmuch as Respondent did not bring his action in a manner to admit of a *combat de titres*. The very fact which appears by evidence, that the right of servitude had been notoriously in dispute between Appellant and Respondent, was sufficient to dismiss Respondent's action, brought in the manner it was.

Appellant, however, mentions that his title to the servitude was legally proved. Henry Sweeny, one of the attesting witnesses, deposes to the execution of it by both the parties, and the absence of Luther Wilcox, the other subscribing witness, from the Province, is established. It is urged that he could not be a legal witness inasmuch as he was brother to James Sweeny and Francis Sweeny. This, Appellant maintains, does not render him incompetent in a cause where he is not related to either of the parties. The signature of James Sweeny is proved by two other witnesses, Japhet and E. H. Le Barron, and it was also proved that Respondent admitted the signature of James Sweeney, and by the evidence of both parties James and Francis Sweeny were shown to be proprietors of the 75 acres, and sold to Woodward, who sold to Respondent. Respondent maintains that Appellant's title of servitude is faulty for want of registration. The answer to this is, that as servitudes being *droits reels* existing by themselves, and the exercise of them being open and visible, do not require enregistration, like mortgages and other encumbrances, which are merely accessory rights, and can only be known by the fact of enregistration. Vide Toullier, Tome III., No. 720.

There is, however, another ground upon which Appellant maintains that the Respondent's action should have been dismissed. The Appellant's land in rear of Respondent's 75 acres was inaccessible to Appellant except by a passage across the said 75 acres. This is clearly proved. This land, then, was *enclavé*. The law gave Appellant the *right* of servitude in this case without any contract whatever. All he required was the *possession annale* to enable him to maintain his possession of this servitude in case of *trouble*. It being a natural servitude sanctioned by law, he could not be deprived of the enjoyment of it. The only right of Respondent was to recover indemnity by personal action. Curmsson Traité des actions Possessoires, p. 323, No. 77, says : "Les articles 662 et suivant du Code ayant placé le passage dont il s'agit au nombre des servitudes legales, le proprietaire à un titre dans la loi, commandée par la necessité, sa possession n' à rien de precaire, le voisin, il est vrai, a le droit de réclamer une indemnité, droit qui ne se prescrit que par trente ans mais c'est là une action personelle à intenter devant les tribunaux ordinaires ; le juge de paix n' a point à s'on occuper, la question de savoir, si le passage a eté pratiqué dans l' année est la seule qu'il doive examiner."

Denisart Col. de Decisions, Vol. III., Mot "Servitude :"—"Independamment des servitudes contractuelles et legales, il y en a de naturelles aux quelles la situation des heritages les assujettit les uns envers les autres."

Among these servitudes reckoned natural is a right of passage to and from a "heritage enclavé." Toullier, Tome III., No 553 : "Il faut donc bien distinguer le passage que la loi accorde à necessité pour le exercice des fonds enclavés, du passage de simple commodité pour le service des fonds non enclavés qui ont une issue sur

la voie publique. Le premier est une servitude légale, qui n'a besoin d'etre justifiée par aucun titre. Son titre est dans la loi, dans le fait prouvé de l'enclave et de la necessité."

"En passant sur l'heritage voisin pour se rendre à la voie publique, le proprietaire du fonds enclavé ne fait qu'user de son droit; il l'exerce *pro suo* et un pareil passage ne peut jamais être reputé precaire, quand meme le fonds servant ne serait pas clos; car un passage fondé par la loi et sur le necessité ne peut pas être reputé de simple tolerance."

The judgment rendered by Chief Justice Bowen, Mr Justice Day, and Mr Justice Short, in the Court below, on the 23rd October last, was in the following terms:

"The Court having heard the parties by their respective Counsel, and having seen and examined the pleadings, evidence and proceedings of record, and on the whole deliberated, considering that the Plaintiff has proved the material allegations in his declaration in this cause filed, and that the allegations in the several exceptions pleaded by the said Defendant in this cause, have not been proved, doth dismiss the said exceptions, maintain said Plaintiff in the possession of the parcel of land described in the Plaintiff's declaration, enjoin said Defendant to desist henceforward from trespassing on said land, or otherwise disturbing or troubling him, said Plaintiff, in the possession thereof, and condemn the said Defendant to pay to said Plaintiff for his loss and damages, twenty shillings Currency, with costs, distraction of which is awarded to Thomas W. Ritchie, the Plaintiff's Attorney, hereby reserving, however, to said Defendant his legal recourse to enforce any right of way on and over said land."

Appellant maintains that the said judgment is erroneous—

1. Because the action was not in proper form to have Respondent's land declared free of a servitude, which was the only correct issue that could be raised between Appellant and Respondent.

2. Because the judgment erroneously maintains Respondent's action with costs as a real action, as if there were a *trouble* of the nature of a usurpation of possession by Appellant, while no such *trouble* was proved.

3. Because said judgment is erroneously predicated upon the necessity of Appellant to prove his title as if directly put in issue, while it was only necessary in this action to prove *possession annals* of servitude, under a claim or color of title.

4. Because the judgment erroneously declares that Appellant failed to establish his title to the servitude in question.

5. Because Appellant proved that his land was *enclavé*, and that he had used and enjoyed the right of way more than a year prior to the institution of Respondent's action and had a right to be maintained in the possession of his servitude, and the only claim of Respondent was a demand for indemnity.

6. Because Respondent did not prove his possession *annale* of the land where the servitude was exercised.

7. Because Appellant proved possession of the servitude 10 years and more *entre presens* under title prior to the institution of Respondent's action.

8. Because said passage had been open to, and used by, the public for more than 10 years, and was thereby established as a road by the Lower Canada and Municipal Road Act.

J. S. SANBORN,
E. T. BROOKS,
Attorneys for Appellant.